



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case no: CA & R 47/2025

In the matter between:

M[...] **N[...]**

Appellant

and

THE STATE

Respondent

Neutral citation: *N[...]* v *The State* (CA&R 47/2025) 20 March 2026.

Coram: Tlaletsi JP et Tyuthuza AJ.

Heard: 02 March 2026.

Delivered: 20 March 2026.

Summary: *Criminal Law – Appeal – Against sentence of life imprisonment on rape count and – 10 years’ imprisonment on each count of assault with intent to do grievous bodily harm – Whether court a quo erred in its finding that substantial and compelling circumstances do not exist – No compelling and substantial circumstances proven – appeal on sentence dismissed.*

ORDER

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1. The appeal against the sentence is dismissed.
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JUDGMENT

Tyuthuza AJ

Introduction:

[1] The appellant, Mr N[...], was charged in the regional division of Upington on the following offences:

- 1.1. Rape, in contravention of section 3 read with sections 1, 2, 50, 55, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,¹ read with sections 92(2), 94, 256, 257 and 261 of the Criminal Procedure Act,² and the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act,³ further read with section 120 of the Children's Act⁴ (count 1);
- 1.2. Assault with intent to do grievous bodily harm read with section 51(2)(b) Part 3 of Schedule 2 of the Criminal Law Amendment Act (count 2); and
- 1.3. Assault with intent to do grievous bodily harm read with section 51(2)(b) Part 3 of Schedule 2 of the Criminal Law Amendment Act (count 3).

[2] In accordance with section 51(1) of the Criminal Law Amendment Act ("the CLAA"), the court is obliged to sentence an offender who rapes someone

¹ 32 of 2007.

² 51 of 1977.

³ 105 of 1997.

⁴ 38 of 2005.

under the age of 16 to life imprisonment, unless substantial and compelling circumstances are present to impose a lesser sentence as contemplated in section 51(3) of the CLAA.

[3] The appellant was legally represented for the duration of the trial and at the commencement of the trial, was informed that the minimum sentences apply to all the charges. The appellant pleaded not guilty to all three counts levelled against him.

[4] The complainant was 11 to 13 years old when the alleged offences were perpetrated against her and she was 15 years old when she testified.

[5] On 29 May 2025, the appellant was found guilty in respect of all three counts and on 3 June 2025, sentenced as follows: on count 1 he was sentenced to life imprisonment; 10 years' imprisonment on count 2; and 10 years' imprisonment on count 3. The sentences on counts 2 and 3 were ordered to run concurrently with the sentence on count 1.

[6] Accordingly, the appellant has an automatic right to appeal to this Court under the provisions of section 309(1)(a) of the Criminal Procedure Act.

[7] The appellant appeals against all the sentences imposed in the court *a quo*.

[8] The grounds of appeal can be summarised as follows:

8.1. That the trial court had erred in imposing the severest form of sentence, namely life imprisonment on count 1, and in so doing, erred in finding that there were no substantial and compelling circumstances warranting deviation from the prescribed minimum sentence on count 1.

8.2. That the court *a quo* had erred in finding that there were also no substantial and compelling circumstances warranting deviation from the prescribed minimum sentence on counts 2 and 3.

8.3. That the trial court, on all counts, had erred in over-emphasising the seriousness of the offences, the interests of society, and the deterrent and retributive purpose of sentencing.

Analysis:

[9] The issue of sentence on appeal, where the imposition of the sentence is governed by the provisions of section 51 of the CLAA, was dealt with in *S v PB*⁵ where the Supreme Court of Appeal (SCA) stated as follows:

“What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court’s exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.”

[10] The approach as cited above, was also accepted in this Court in *Van Rooy v S*⁶ where it was stated:

“Accordingly, the correct approach in considering an appeal on a sentence imposed under the provisions of section 51 of the CLAA as set out in *S v PB*, is to assess the evidence on the record and make a determination as to whether such evidence constitutes substantial and compelling grounds to depart from the prescribed minimum sentence or not. After the decision in the SCA in the case of *S v PB*, that is the correct point of departure.”

⁵ 2013 (2) SACR 533 (SCA) para 20.

⁶ [2024] ZANHC 50 para 6.

- [11] It is trite that the appeal court does not have a general discretion to interfere with the sentence imposed by the trial court. It will only interfere with a sentence on appeal if it appears that the trial court has exercised its discretion in an improper or unreasonable manner.⁷ In *S v Kgosimore*,⁸ the SCA puts it in the following terms:

“It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.” (Footnotes omitted.)

- [12] In *Director of Public Prosecution, Gauteng v Tsotetsi*,⁹ Crippin AJA said: “[a]s held in *Malgas* confirmed in *S v Dodo*, and explained in *S v Vilakazi*, even though ‘substantial and compelling’ factors need not be exceptional, they must be truly convincing reasons, or ‘weighty justification’, for deviating from the prescribed sentence. The minimum sentence is not to be deviated from lightly and should ordinarily be imposed.”
- [13] On behalf of the appellant, it was argued that the following factors should have been considered cumulatively as substantial and compelling factors to justify a deviation from the minimum sentence: (a) the personal circumstances of the appellant, (b) the absence of any serious physical violence committed against the complainant during the rape incidents, (c) the lack of permanent emotional injuries to the complainant, (d) remorse shown by the appellant, and (e) that the prospects of rehabilitation were good.

⁷ *Gerber v S* [1998] 4 All SA 315 (NC).

⁸ 1999 (2) SACR 238 (SCA) para 10.

⁹ 2017 (2) SACR 233 (SCA) para 27.

[14] As alluded to above, it is trite that in order for the court to deviate from the prescribed minimum sentence, the court must consider whether the personal circumstances of the accused are substantial enough to avoid being called 'flimsy'.¹⁰

[15] The appellant relied on the following personal circumstances: (a) he is 42 years old, (b) he is (was) married to the mother of the complainant, (c) he has a 15 year old son, (d) he pays maintenance for his son in the amount of R2,000.00, (e) at the time of his arrest he was employed as a general worker at Skytech where he earned about R9,000.00 per month, (f) he is healthy, (g) he attended school until grade 6, (h) he has one previous conviction for trespassing in 2012, and (i) he has been in custody for a year and 9 months.

[16] In *S v Vilakazi*,¹¹ the SCA pronounced that the personal circumstances of the accused recede into the background in cases of serious crimes and held that:

"Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that *Malgas* said should be avoided."

[17] Mr Fourie, for the appellant, correctly conceded that the appellant's circumstances were not compelling. The appellant's personal circumstances are not out of the ordinary. We are satisfied that these factors, either individually or cumulatively, do not represent substantial and compelling circumstances to allow this Court to deviate from the prescribed minimum sentences.

[18] It was argued, on behalf of the appellant, that the absence of physical injuries on the count of rape must be taken into account when determining the proportionately of the sentence imposed. The respondent emphasised that it

¹⁰ *S v Malgas* 2001 (1) SACR 469 (SCA) para 25.

¹¹ 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 58.

is trite law, as provided in section 51(3)(aA)(ii) of the CLAA, that the lack of physical violence or injuries during rape is not compelling circumstances. Indeed, Mr Fourie, in his written submissions, conceded that the lack of physical injuries is but a factor to be considered and not compelling circumstances on its own.

[19] In light of the circumstances of this case, it might as well be that the appellant would not have to inflict serious physical injuries to bring an 11-year-old to succumb to his will. What cannot be ignored is the power the parental authority gave the appellant over the complainant. The appellant was married to the complainant's mother and the three lived together. This was essentially the complainant's father, the man who took her to school sometimes, and bought her gadgets like cell phones. Without unnecessarily casting criticism on the complainant's mother, the appellant was the man who was let by the very complainant's mother to take the complainant to the clinic for a wound he inflicted. He was even involved in taking the complainant to the clinic for family planning when he was, unbeknownst to the mother of the complainant but not without suspicion, the one raping the complainant. It is so that the appellant took advantage of an environment he had to some degree created, and which enabled his perversion. His role was to protect the complainant and her mother, instead, he preyed upon the complainant in the sanctity of her home.

[20] Courts must be careful not to cross the line and make the presence of physical violence a requirement for the imposition of life imprisonment in rape cases. In the words of Spilg J; "[o]ne should therefore not draw the conclusion that the absence of physical injuries will mean that the rape victim's suffering will be any lesser or that the offence, where the victim is under-aged, should be treated less seriously for purposes of sentence."¹² While relatively similar decided cases such as *S v SMM*¹³ and *S v Stuurman*¹⁴ may be considered for guidance as submitted by the appellant, sentencing calls for an individualised

¹² *Radebe v S* [2019] 3 All SA 938 (GP) para 48.

¹³ 2013 (2) SACR 292 (SCA).

¹⁴ 2017 JDR 1688 (NCK).

approach wherein each case must be dealt with in light of all its surrounding circumstances.¹⁵

- [21] In the same length, the submission about the lack of expert evidence on the impact of the rape on the complainant does not assist the appellant *in casu*. It has been held that rape impacts on the psychological and emotional well-being of the victim with potentially life-changing consequences, even if not immediately apparent. Thus:

“Emotional and psychological trauma and their long term *sequelae* comprise a self-contained enquiry which may or may not be influenced by the presence of physical injury but is not *ipso facto* diminished by the latter’s absence.”¹⁶

- [22] We agree with the trial court that the fact that the State only provided the victim statement does not mean that sentencing should be approached as though the complainant suffered or continues to suffer no psychological harm. Mpati JA in *S v Mahomotsa*¹⁷ summed it as follows:

“While it may theoretically be possible that a victim of rape . . . may not suffer any psychological damage other than that experienced while the attack is taking place and in its immediate aftermath, it is in the highest degree unlikely. Where as here, the complainants were young girls, it is quite unrealistic to suppose that there will be no psychological harm. To quantify its likely duration and degree of intensity, of course, is not possible in the absence of appropriate evidence, but that does not mean that one should approach the question of sentence on the footing that there was no psychological harm.”

- [23] In any event, the victim statement *in casu* demonstrates that the complainant is still traumatised and is struggling to come to terms with what happened, what the appellant did to her. It was conceded by the appellant in the court *a quo* that the complainant had even attempted suicide. It cannot be ignored that the complainant had to endure multiple incidents of rape over a period of

¹⁵ *S v Samuels* 2011 (1) SACR 9 (SCA) para 9; *S v D* 1995 (1) SACR 259 (A) at 260E; *S v PB* 2013 (2) SACR 533 (SCA) para 16.

¹⁶ *Radebe v S* (*Supra* fn 12) para 48.

¹⁷ 2002 (2) SACR 435 (SCA) para 11.

three years. Further, on two of the five incidents of rape, the complainant was raped while still in pain after being assaulted with a hosepipe and fists, respectively. The complaints' evidence was that after being beaten with a hosepipe, she could not lie on her back due to the injuries and yet, the complainant still went on to rape her while she lay on her stomach.

[24] Further, the appellant had even threatened to kill the complainant should she tell anyone about the rape, his conduct affected her schooling as she failed grade 4 in 2020, not to mention that she was also taken out of school in 2023. Sometimes she was prohibited from engaging with other children, and given a reputation of being a naughty, promiscuous child who was sleeping around with men. Ultimately, the complainant was separated from her mother in 2023 and moved to Gauteng to live with her grandmother. The fact that the appellant painted such a picture about his own stepdaughter, knowing well that he is the one raping her, is beyond understanding. The appellant's conduct was at all levels reprehensible. He preyed on the vulnerability of his stepdaughter and destroyed her childhood. This was a perverse abuse of his power over a child whose only wish was to come live with her mother. The trial court cannot be said to have overemphasised the fact that it is especially in cases of this nature that courts are entrusted to act judiciously and to protect the most vulnerable members of society, such as children, through the criminal justice system in which the public places its confidence.

[25] It truly cannot be overstated that rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution.¹⁸

[26] It was submitted on behalf of the appellant that he showed remorse for his conduct after being sentenced, and that this is indicative of him being able to be rehabilitated. The SCA has expressed the difference between remorse and regret as follows:

¹⁸ *S v Nkunkuma and Others* 2014 (2) SACR 168 (SCA) para 17.

“There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere, and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”¹⁹

[27] The appellant pleaded not guilty to the charges levelled against him and continued to deny the allegations. He only apologised for his conduct after he was sentenced to life imprisonment. Prior to the sentencing, the appellant neither took any accountability for his actions, nor demonstrated a ‘gnawing pain of conscience’. The appellant raped and tormented his minor stepdaughter for a period of three years and would have probably continued doing so, had he not been caught red-handed in June 2023. The court *a quo* correctly found that the appellant showed no grain of remorse. Accordingly, contrary to Mr Fourie’s submissions before this Court, the appellant’s conduct throughout the trial provides nothing for an inference that there are high prospects of rehabilitation.

[28] Turning to the sentence on counts 2 and 3 of assault with the intent to do grievous bodily harm. Two incidents of assault on the defenceless minor complainant were detailed. In the first one, the complainant’s wrists were fastened with a rope and hung from the ceiling. As alluded to above, she was then continuously beaten on the back and on the thighs with a hosepipe. The

¹⁹ *S v Matyityi* [2010] 2 All SA 424 (SCA) para 13.

complainant's mother testified that she had seen red marks on the complainant's buttocks. It was the complainant's evidence that the injuries caused her so much pain that she could not lie on her back. Further, although the medical examination was conducted about 8 months after the first incident of assault, the report still demonstrated faded horizontal bruises on the complainant's right shoulder blade area and on her upper interior thigh. Dr Figuero testified that those injuries were probably produced by hosepipe or a similar blunt object.

[29] During the second incident, the complainant was hit by fists and suffered a black eye. She was also burnt on the arm, and it was the complainant's evidence that the wound still hurts sometimes, despite having healed. The complainant's mother also testified that she had witnessed the appellant 'boot' the complainant- kick her with his boots on. Ultimately, the court *a quo's* finding, that the circumstances of this case are such that the factors relied upon by the appellant to establish compelling circumstances warranting a deviation from the prescribed minimum sentences fall short, cannot be disturbed.

[30] Having applied the tests laid down and having considered all the relevant facts, factors and circumstances, we are of the considered view that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence on all counts. Furthermore, there was no misdirection in relation to the sentences imposed on all three counts. Finally, the sentences imposed do not induce a sense of shock and they are not disproportionate.

[31] In the result, the following order is made:

1. The appeal against the sentence is dismissed.

ACTING JUDGE
NORTHERN CAPE DIVISION

I concur.

LP TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

Appearances

For the Appellant:
On instructions of:

Mr P. Fourie
Legal-Aid South Africa

For the Respondent:
On instructions of:

Adv T. Engelbrecht
The Director of Public Prosecutions